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**From:** [REDACTED]  
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**To:** [REDACTED]  
**Cc:** [REDACTED]  
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**Subject:** RE: Case Information

[REDACTED],

Below please find our thoughts on the *Gabelli* case. Please let us know if you have any further questions.

In *Gabelli*, the question was whether a five-year limitations period on fraud penalties against investment advisors begins to run when the fraud is complete or when the fraud is discovered. The opinion does not support the contention that there cannot be an indefinite statute of limitations for civil penalties.

First, *Gabelli* involved a limitations statute that all agreed was applicable. In contrast, there is no limitations statute readily identifiable that applies to section 6707 penalties prior to AJCA changes. The language of limitations statutes in the Code just don't fit the section 6707 penalty. For example, section 6501 runs from the filing of a return. But there is no return on which the pre-AJCA penalty is based. So, there is no way to know what the limitations period would be and it appears that the advisors here suggested no limitations statute that they believe applies.

Second, the Court drew a distinction between when the government is a victim and when the government is bringing an action in which others were victims. In the former case, the law recognizes that it would be improper for a limitations period to run when the fraud subject to penalty was so effective that the victim didn't know the fraud had occurred. This rationale did not have the same force when the government was not the victim. For section 6707 penalties, it is the government that is the victim. The government is unable to timely investigate tax shelter schemes to determine whether proper tax is being paid to the government if promoters do not timely inform the government of the shelters they are promoting. In *Gabelli*, however, the government was not the victim of fraud; the victims were the clients of the investment advisors.

Third, the Court quotes John Marshall as condemning an unlimited period to bring a penalty action. However, that is not the holding in *Gabelli*. It clearly isn't a rule of law because section 6501(c)(1) plainly allows for an unlimited statute to bring a section 6663 fraud penalty. Additionally, Chief Justice Marshall appears to have been addressing penalties that punish rather than those that extract compensation and arguably the section 6707 penalty is designed to roughly compensate the government for the time and expense in discovering tax shelters and revenue lost from failing to do so when a promoter did not register the tax shelter. With respect to penalties relating to promoters, courts have acknowledged that while an unlimited period of limitations "may seem a harsh result," the result is "in accordance with jurisprudence regarding the applicability of statutes of limitations to causes of action in favor of the government" and that the result "furthers the interests of Congress in combatting fraud relating to the filing of various tax documents." *Mullikin v. United States*, 952 F. 2d 920, 929 (6th Cir. 1992).

In Chief Counsel Advice issued in 2001, the Service provided advice regarding whether there was a period of limitations under section 6707(a)(1) for the failure to register a tax shelter. CCA 200112003 (Nov. 28, 2000). The CCA concludes that there is no period of limitations for assessing the penalty under section 6707(a)(1). This is based on the conclusion that the penalty under section 6707(a) is not a return-based liability, so it is not governed by the general period of limitations in section 6501. The CCA also notes that the Service has successfully argued that no period of limitations applies to promoter penalties under sections 6700 and 6701 and that these penalties may be assessed at any time. Courts have rejected both the application of section 6501 and 28 U.S.C. 2462 to such penalties. See, e.g., *Mullikin v. United States*, 952 F. 2d 920 (6th Cir. 1991) (concluding that the Congress did not intend the statute of limitations contained in 28 USC 2462 to apply to the assessment of penalties under section 6701); *Lamb v. United States*, 977 F. 2d 1296 (8th Cir. 1992) (following *Mullikin* and concluding that the period of limitations in 28 USC 2462 does not apply to the assessment of penalties under sections 6700 or 6701); *Capozzi v. United States*, 980 F. 2d 872 (2d Cir. 1992) (finding that 28 USC 2462 does not impose a period of limitations on assessments under section 6700 because (1) 28 USC 2462 applies only to an "action, suit, or proceeding" which is different from an assessment, which is an ex parte act, and (2) 28 USC 2462 applies only to adversarial proceedings for the enforcement of any civil fine, penalty, or forfeiture, but an assessment is not an enforcement but is merely the determination of a penalty); *Sage v. United States*, 908 F. 2d 18 (5th Cir. 1990) (holding that no period of limitations applies to the penalty under section 6700).

Kind regards,

